

VZCZCXRO0765

PP RUEHCD RUEHGD RUEHHO RUEHMC RUEHNG RUEHNL RUEHRD RUEHRS RUEHTM

DE RUEHME #1840/01 1682202

ZNR UUUUU ZZH

P 162202Z JUN 08

FM AMEMBASSY MEXICO

TO RUEHC/SECSTATE WASHDC PRIORITY 2250

INFO RUEHXC/ALL US CONSULATES IN MEXICO COLLECTIVE PRIORITY

RUCPDO/DEPT OF COMMERCE WASHINGTON DC PRIORITY

RUEAWJA/DEPT OF JUSTICE WASHINGTON DC PRIORITY

RUEHC/DEPT OF LABOR WASHINGTON DC PRIORITY

RUEATRS/DEPT OF TREASURY WASHINGTON DC PRIORITY

RHEHNSC/NSC WASHINGTON DC PRIORITY

UNCLAS SECTION 01 OF 02 MEXICO 001840

SENSITIVE

SIPDIS

STATE FOR WHA/MEX/WOLFSON, WHA/EPSC/SALAZAR, AND EEB/TPP/MTA

DOJ FOR CALDWELL HARROP

STATE PASS FTC FOR RUSSELL DAMTOFT

STATE PASS USTR FOR EISSENSTAT/MELLE/SHIGETOMI

COMMERCE FOR 4320/ITA/MAC/ONAFITA/WORD

E.O. 12958: N/A

TAGS: [ECON](#) [ETRD](#) [PGOV](#) [MX](#)

SUBJECT: RAISING MEXICAN JUDICIAL AWARENESS ON COMPETITION  
ENFORCEMENT

REF: 07 MEXICO 6249

Summary

-----

1. (U) A U.S. District Court judge spent three days in Mexico discussing criteria used in American courts to adjudicate competition cases. His conversations with Mexican judges, officials, and attorneys highlighted the similarity between the substantive principles that underlie U.S. and Mexican competition legislation, but also revealed major differences in how the laws are applied in the two countries. The following week, an expert from the Federal Trade Commission spoke at an academic conference on how the U.S. government enforces competition rules. Both events were part of an ongoing collaboration between the USG and Mexico's competition authority (the Federal Competition Commission, or CFC) to raise awareness among key Mexican actors of the importance of competition enforcement. Separately, a bill to toughen penalties against anti-competitive behavior remains mired down in the lower chamber of Mexico's Congress, and the CFC plans to issue rules on compelling companies under investigation to provide information. End summary.

2. (U) Vaughn Walker, Chief Judge of the U.S. District Court of Southern California, visited Mexico City June 2-4 to participate in a series of events organized jointly by the Embassy (USAID and ECON) and Mexico's Federal Competition Commission (CFC). These included a breakfast talk with the Association of Corporate Lawyers, a small roundtable discussion with Mexican federal judges and magistrates (magistrates are roughly equivalent to U.S. Circuit Court judges), a seminar for federal court law clerks, and a roundtable discussion with lawyers and economists from the CFC.

3. (U) In his presentations, Walker emphasized the importance of effective enforcement of competition rules to economic growth and noted the striking similarities of the substantive legal frameworks on competition in the various countries he has visited to discuss the topic. He also discussed the sorts of criteria that he and other U.S. judges have applied in various competition cases (he himself heard the DOJ case against Oracle's acquisition of PeopleSoft). For mergers, he underlined the importance and difficulty of identifying the relevant market, and recommended paying close attention to the more global nature of competition in many sectors, as well as the impact of new technologies that can completely

alter the "relevant" market. He also stressed the additional weight that should be given to hard price data and to the perspective of consumers versus suppliers in any given market. With regard to outright anti-competitive practices, he again stressed the importance of pricing evidence, but also the need for some kind of evidence, including circumstantial, of intent to collude.

¶4. (U) Despite the similarity in the basic competition principles underlying U.S. and Mexican laws, Judge Walker's Mexican interlocutors pointed out numerous differences in the way the Mexican legal system actually works, including: 1) In Mexico, neither civil suits, criminal cases, or cases initiated by state (vice federal) authorities are allowed -- all competition cases must be funneled through the CFC, which has administrative (but not penal) enforcement authority. 2) Mexican judges ruling on appeals of CFC decisions rely almost exclusively on written submissions from the involved parties and rarely, if ever, call on witnesses to testify in person. 3) Under Mexico's competition law, consumer benefit is not considered a criterion, though market efficiency -- a very similar concept -- is. 4) Relative to their U.S. counterparts, Mexican judges place a higher premium on strict adherence to procedural form versus substantive arguments.

¶5. (U) The CFC and Anahuac University (a well-known Mexico City school) have launched an ongoing education course on competition law for interested professionals. Russell Damtoft, Associate Director of the International Affairs Office of the Federal Trade Commission, gave two days of presentations on how the U.S. competition enforcement regime

MEXICO 00001840 002 OF 002

functions. During the first day, Damtoft detailed the origins and development of U.S. competition law and institutions, as well as some of the key cases to date that have formed U.S. jurisprudence on this subject. He also gave a detailed description of how the FTC and the Department of Justice (DOJ) pursue competition cases, from the preliminary investigative phase all the way through possible appeals to the U.S. Supreme Court. Like Judge Walker, Damtoft cautioned that accusations of illegal conduct from competitors on the supply side are frequently based on nothing more than a desire to harrass a business rival, and that the effect on consumers should be the paramount consideration in guiding government enforcement decisions. Damtoft also described the considerable powers enjoyed by U.S. enforcement agencies in compelling companies to provide all information relevant to a case under investigation, up to having a judge throw uncooperative witnesses in jail for contempt of court. While Mexico's CFC does have authority to seek information from relevant economic actors, it currently lacks teeth to effectively deter those who chooseto stonewall.

¶6. (U) On the second day, Damtoft discussed how firms interested in avoiding the rigors of competition in the marketplace frequently resort to legislators and/or regulators to seek anti-competitive regulations that can thwart effective competition, a practice at least as pernicious as anti-competitive business conduct. He detailed how the FTC and DOJ engage in a process of competition advocacy to help educate lawmakers and regulators about the true costs of such anti-competitive regulation. Finally, he elaborated on the relationship between competition, which focuses on the supply of goods and services, and consumer protection, which addresses distortions to consumer demand, and the importance of ensuring a sound relationship between the two disciplines so that they mutually reinforce the functioning of a market economy.

¶7. (U) With regard to CFC's ability to compel companies to provide information relevant to its investigations (para 5), Heidi Sada, CFC's Director for Capacity-Building, told Damtoft and Econoffs that in fact the competition legislation passed in 2006 provides some stronger tools for doing just that. However, CFC has not yet completed the process of

writing the implementing rules. According to Sada, these rules should be finalized and implemented by the end of this year. Finally, CFC officials report that the bill introduced in the lower chamber of the Mexican Congress at the end of last year to increase significantly the penalties CFC can impose for anti-competitive conduct (REFTEL) has become watered down and tied to other proposals that do not enjoy government support. This being the case, CFC is not currently supporting passage of the bill.

Comment

-----

18. (SBU) Lack of competition in key domestic sectors continues to be a major obstacle not only to Mexican and foreign firms interested in entering those sectors, but to achieving the higher economic growth rate that Mexico needs to alleviate widespread poverty. The CFC remains a weak competition watchdog relative to its counterparts in the U.S., Europe, and other developed countries, but is cognizant of its shortcomings and working hard to address them. This means building its own technical capacity, engaging the legislature and judiciary on why a stronger competition enforcement regime is important to Mexico's future, and raising consciousness among relevant segments of the Mexican economy. The Embassy will continue to support CFC's efforts in all these areas. End comment.

Visit Mexico City's Classified Web Site at

<http://www.state.sgov.gov/p/wha/mexicocity> and the North American Partnership Blog at <http://www.intelink.gov/communities/state/nap/> /  
GARZA